

**American Arbitration Association  
Arbitration Pursuant to Agreement of the Parties  
Before Timothy J. Brown, Esquire**

**In the matter of:**

**Fraternal Order of Police, Lodge #5**

**and**

**City of Philadelphia**

**(15-day Suspension of Sgt. John J Massi)**

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**AAA Case No. 14-20-1100-1236**

**Decision and Award**

**Appearances:**

**On behalf of FOP Lodge # 5;**

Andrew MacDonald, Esquire  
Jennings Sigmond PC  
510 Walnut Street, 16<sup>th</sup> Floor  
Philadelphia, PA 19106-1595

**On behalf of the City of Philadelphia:**

Ben Patchen, Esquire  
City of Philadelphia Law Department  
Labor & Employment Unit  
1515 Arch Street, 16<sup>st</sup> Fl.  
Philadelphia, PA 19102



Dated: July 8, 2016

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Timothy J Brown, Esquire  
Arbitrator

## INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement (the Agreement) between **Fraternal Order of Police, Lodge #5** (referred to herein as the FOP or the Union) and **The City of Philadelphia** (the City or the Employer). The Union filed a timely grievance challenging the 15-day suspension of Sergeant John J. Massi (referred to herein as Grievant). The parties were unsuccessful in resolving the grievance through their grievance procedure and the Union thereafter filed a timely demand for arbitration. The parties selected the undersigned as arbitrator through the processes of the American Arbitration Association (AAA) to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard by the undersigned on June 21, 2016 in Philadelphia, Pennsylvania. All present were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire hearing and testified on his own behalf. Following the hearing the parties elected to present post-hearing oral closing argument, upon the receipt of which by the Arbitrator the dispute was deemed submitted at the close of business June 21, 2016.

This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

## Issues

The parties stipulated that there are no procedural bars to presentation of the matter; that the matter is appropriately before the arbitrator; that the arbitrator has the authority to render a final and binding decision and award in the matter and that the issue or issues presented may accurately be stated as:

Did the City of Philadelphia have just cause to issue Police Sergeant John J. Massi a 15-day suspension and, if not, what shall be the remedy?

## FACTS

### Introduction

At the time of the arbitration hearing Grievant had worked for the Police Department for approximately 18 & ½ years. During the events at issue here he held the position of Patrol Sargent in the Department's 17<sup>th</sup> Division. By Notice of Suspension signed on behalf of the Police Commissioner on May 26, 2011, Grievant was notified that he was receiving a fifteen (15) day disciplinary suspension for "Insubordination, Section 4-s-00210: Refusal to promptly obey proper orders from a superior officer" on September 21, 2010.<sup>1</sup> The Notice of Suspension provided the following reasons for the suspension:

In that on Tuesday, September 21, 2010, approximately 5:10 PM, you were ordered to report to the office of Captain W[REDACTED]. Captain W[REDACTED] observed you entering his outer office and told you to come into his office to discuss an incident that had taken place at Audenreid High School. Both you and Sergeant J[REDACTED] M[REDACTED] #[REDACTED] entered into Captain W[REDACTED]'s office at the same time. Captain W[REDACTED] began to ask you about the school incident, but you cut him off, telling him several times, "I don't have anything to say to you." Captain W[REDACTED] then asked Sergeant M[REDACTED] if he needed anything. You had asked Sergeant M[REDACTED], who was the [REDACTED], to accompany you even though Sergeant M[REDACTED] was not the street supervisor at the time of the incident and did not have information about the school incident to provide. Sergeant M[REDACTED] was attempting to explain that you had asked him to come with you but before he could finish, you interrupted him and told Captain W[REDACTED] that he was your witness. Captain W[REDACTED]

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<sup>1</sup> All dates are 2010 unless otherwise indicated.

told Sergeant M [REDACTED] that he was not needed and he could resume his duties.

As Sergeant M [REDACTED] was leaving the office, you also walked out, telling Captain W [REDACTED] that you would not speak to him without a witness or a union representative. Captain W [REDACTED] ordered you to return to his office and informed you that if you did not return, formal discipline would be instituted. You did not return as ordered.<sup>2</sup>

The evidence admitted during the arbitration hearing substantially supports the above-quoted description of the September 21 interaction between Grievant and Captain W [REDACTED] contained in the Notice of Suspension; and I find the facts stated in the narrative to be true.

At the arbitration hearing, then Captain- [REDACTED] A [REDACTED] W [REDACTED] testified that he called Grievant to his office on September 21 because the Captain wanted information relating to a violent incident at the Audenreid High School; information the Captain believed would be helpful in his ongoing efforts to avoid in-school incidents of violence spilling over into the gang-influenced community, including potential away-from-school retaliation against school police officers. According to W [REDACTED], he told Grievant exactly what he wanted to talk to the Sergeant about and that the meeting was not disciplinary in nature.

W [REDACTED] testified that Grievant's refusal to speak with him on September 21 - after the Captain specifically warned the Sergeant that his refusal to answer questions from the Captain would be cause for discipline for refusal to obey orders - was "absolutely insubordination." W [REDACTED] explained the importance of enforcing rules relating to obeying orders from superior officers to police department discipline and

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<sup>2</sup> In addition to his 15-day suspension, Grievant received a disciplinary transfer.

safety, and that here Grievant not only blatantly disobeyed his order, but did so in the presence of Sergeant M [REDACTED] and at least two other officers in the Captain's office area.

W [REDACTED] also testified that he was aware of an unfair labor practice charge involving Grievant and that Grievant had named W [REDACTED] along with ten or twelve others in a lawsuit. W [REDACTED] testified that he did not recall that there was an arbitration scheduled involving himself and Grievant within a few days after September 21. He also testified he is well aware of the requirements to comply with bargaining unit member requests for a Union representative when a meeting is disciplinary in nature, that the September 21 meeting involved an ongoing policing concern and was not disciplinary, that he never had a conversation with Grievant where Grievant had a witness and that there was no understanding between Grievant and W [REDACTED] that when Grievant spoke to W [REDACTED] Grievant could have a witness.

According to W [REDACTED], after Grievant left his office on September 21 the Captain immediately began paperwork to follow-up on his expressed intent to discipline Grievant. Thereafter, Lt Charles Voght conducted interviews relating to the September 21 incident, including interviews of Grievant and Sergeant M [REDACTED], and the two Officers who were in the Captain's outer office during the September 21 exchange; Police Officers A [REDACTED] G [REDACTED] and F [REDACTED] M [REDACTED]. On October 14 Grievant was served with a "Statement of Charges Filed and Action Taken" asserting that Grievant had engaged in insubordination – refusal to promptly obey proper orders from a superior officer.

Grievant plead not guilty to the charges and requested a hearing on the matter. A Police Board of Inquiry (P.B.I.) was conducted on the charges on May 16, 2011 after which all

three Board members found Grievant guilty and assessed a 15-day suspension and transfer.

### **The Police Disciplinary Code**

At the time of the May 2011 P.B.I., the Department applied the Department's 2010 Police Disciplinary Code. That Code provided a range of discipline for a first offense of insubordination – refusal to promptly obey proper orders from a superior officer of “15 to 30 days.” Similarly, the P.B.I. form completed by Board members at the May 16, 2011 hearing on the matter specified that the “penalty range” for violation of 4-s002-10 was “15-30 Days Suspension.”

The record establishes that the institution of the 2010 Disciplinary Code was the subject of an Unfair Labor Practice Charge by the Union and a resulting “proposed decision and order” issued by the PLRB Hearing Officer finding that the penalty and reckoning period in the 2010 Code relating to discipline for refusal to promptly obey proper orders from a superior officer had not been bargained. The parties stipulated that after the ULP decision a controlling Act 111 Decision issued holding that the substance of the penalty levels for the term of the parties' July 1, 2009 through June 30, 2014 Bargaining Agreement was the same as those contained in the 1999 Police Disciplinary Code.

As a consequence, the Disciplinary Code effective on September 21, 2010 and for all times relevant herein, was the Disciplinary Code of 1999. The 1999 Code provides a disciplinary range for “Insubordination, [r]efusal to obey proper orders from a superior officer” of 5 to 30 days for the first offense.

### **Grievant's Testimony**

Grievant testified that he and Captain W [REDACTED] had a history and when he received the "time check" and instructions to report to Captain W [REDACTED] on September 21, he believed that the "time check" was to potentially build a case against him and that the reason the Captain was summoning him had to do with Grievant's involvement in a then pending unfair labor practice charge, a discrimination charge and an arbitration, the latter of which was scheduled for September 24 and for which, Grievant believed, the Captain had just received a subpoena to attend. Grievant testified that, at the time, he and the Captain had an understanding that whenever Grievant met with the Captain, Grievant could have another sergeant or other bargaining unit member present. Grievant testified that prior to the September 21 meeting he had met with the Captain with a fellow-sergeant or other witness at least twelve times.<sup>3</sup> Grievant testified that although he had his suspicions, he did not know the reason for the September 21 meeting. He also testified that his duties had nothing to do with the Philadelphia School system, but later testified that he had been called to the school after-the incident at Audenreid High School.

Grievant testified that the reason he wanted M [REDACTED] present with him, as well as witnesses present during his prior twelve meetings with W [REDACTED], was because of an incident when W [REDACTED] yelled at and cursed Grievant in the presence of another Captain. According to Grievant, he feared having a physical altercation with W [REDACTED].

Grievant testified that when he arrived at W [REDACTED]'s office on September 21, he asked Sergeant M [REDACTED] to come with him (he did not tell M [REDACTED] the reason for his

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<sup>3</sup> During his testimony, Captain W [REDACTED] denied that there was such an understanding or that he had previously met with Grievant under a witness-present understanding. Similarly, Sergeant M [REDACTED] testified that he had never acted as a witness for Grievant in any prior conversation between Grievant and W [REDACTED].

accompaniment) and that when the two arrived at W [REDACTED]'s office the Captain asked M [REDACTED] why he was present. To which, according to Grievant, M [REDACTED] stated he was there with Grievant. According to Grievant, Grievant responded "No, no he is here as my witness" to which W [REDACTED] responded by telling M [REDACTED] to leave and instructing Grievant to go into W [REDACTED]'s office. Grievant testified that he then told the Captain "no" and that he wanted the FOP and was going to go to Inspector M [REDACTED] about this. Grievant admitted that W [REDACTED] then stated that he was "ordering" Grievant to go into the office, and that if he do not "I will take you to the front;" a reference to taking disciplinary action against Grievant. Grievant testified that at no time during the meeting did he ask W [REDACTED] what the meeting was about.

According to Grievant, when he initially went to respond to the Captain's summoning him to the office, Grievant did not call the FOP because at the time he just wanted M [REDACTED] present should W [REDACTED] try to start an altercation with Grievant or fabricate something. Only when W [REDACTED] reacted to his statement that he wanted M [REDACTED] present as a witness and instructed M [REDACTED] to leave, in combination with the fact that W [REDACTED] had previously asked for a "time check" and displayed a demeanor and tone of voice causing Grievant concern, Grievant explained, did Grievant feel the meeting was disciplinary in nature. According to Grievant, he believed W [REDACTED]'s order that he go into the Captain's office was unlawful and that Grievant "believed the meeting was going to be unfavorable to me." Grievant did not elaborate on his claim of the unlawful nature of the order.

Grievant testified that he then left the office, drove to Inspector M [REDACTED]'s office (the Inspector was not in) and called the FOP. He explained that after speaking to the



FOP he then returned to the 17<sup>th</sup> District to talk with W [REDACTED]. He testified that on his return trip he again did not have an FOP representative present with him and that when he approached the Captain - who was engaged in another matter - the Captain saw him and told him to “go.”

Grievant testified that as a sergeant he expects his subordinates to answer his questions about police matters and expects his subordinates to follow lawful orders.

### **Positions of the Parties**

#### **The Employer**

The City has shown just cause for the discharge of Grievant, the Employer argued. Grievant is a disgruntled employee, who felt disrespected by his Captain and did not ( and does not) like Captain W [REDACTED]. Contrary to the claim of the Union, there was no violation of the employee’s Weingarten rights here, the City asserted. As reflected in the record, both Captain W [REDACTED] and Grievant follow procedures when interacting with their respective subordinates and notify their subordinates of the right to have a Union representative present at disciplinary meetings. Although it may be true that a superior’s edict does not define when an employee is entitled to Weingarten rights, the City argued, here Grievant did not have a reasonable expectation that the September 21 meeting called by W [REDACTED] could lead to Grievant’s discipline. Such absence of reasonable expectation is established, the City maintained; (1) by the fact that Grievant admitted he did not know what the meeting was about and he simply refused to meet with the Captain for any reason without a witness present, (2) had he expected discipline from the meeting he would have had a Union representative present when he arrived for the

meeting, and (3) after initially refusing to meet with W [REDACTED] and going to the Inspector's office and discussing the matter with the FOP, even when Grievant returned to speak with W [REDACTED] he was without a Union representative.

The record establishes that the subject of the meeting called on September 21 was legitimate police business and that Grievant clearly refused to obey the order of Captain W [REDACTED] to go into the Captain's office. Grievant's refusal to obey an order here was egregious not only because of its blatant nature, but also because Grievant's blatant refusal to obey took place in the presence of three other employees of the department, thereby having the potential of undercutting the discipline of the department. Notwithstanding that the department was operating under a code of discipline that was not effective, the fact is, the City argued, even under the 1999 Code the 15-day suspension was within the range of discipline presented in the Code for a first offense of the rule. The discipline imposed upon Grievant was proportional and appropriate considering the severity of Grievant's offense and should be sustained by the arbitrator.

### **The Union**

According to the Union, here the City has the burden of proof to establish just cause for its discipline of Grievant. Just cause requires due process, the Union asserted, and due process incorporates the Weingarten protections given employees. Here, Grievant was denied such protections. Weingarten provides that where an employee is subject to an interview that the employee reasonably believes could lead to discipline, the employee is entitled to have a witness present for the interview. The fact is, the Union argued, within the circumstance of a police force, an employee is stuck between a rock

and a hard place when it comes to the exercise of Weingarten rights and potentially engaging in insubordination. But no matter the difficulty in applying the right, the Weingarten right covers members of the police department and should be applied. Considering the background and context of Grievant's arbitration, discrimination claim and ULP involvement, when Grievant was summoned to W [REDACTED]'s office without any explanation by the Captain as to the nature of the meeting, Grievant had reason to believe the meeting was going to potentially lead to his discipline. Contrary to the claim of the Captain, the Union asserted, the rights established by Weingarten are not dependent upon a manager's decision that they should apply to a particular meeting. The triggering of the right originates from the employee's perspective, and exists whenever an employee has a reasonable belief that a meeting could lead to discipline, the Union argued. Here, as established by the long history between Grievant and W [REDACTED], on September 21 Grievant had such a reasonable belief. Having failed to provide Grievant due process, the Union asserted, the grievance should be sustained.

Even in the event there was just cause for discipline, the Union continued, the 15-day suspension issued Grievant was excessive under the circumstances and considering the mitigating context and history surrounding the conduct. Moreover, the Union maintained, the discipline issued was pursuant to a Disciplinary Code that was unlawfully implemented and provided a minimum penalty of a 15-day suspension for the violation found by the P.B.I. However, the Union continued, the minimum discipline under the Code that actually controlled – the 1999 Police Discipline Code – was a 5-day (not a 15-day) suspension for the first offense of the rule involved. As a consequence, the Union argued, even if the City had cause to discipline Grievant, and applied the minimum

penalty for a first offense as it did here, Grievant would have received only a 5-day suspension. Accordingly, should the arbitrator find there was cause for discipline of Grievant, the discipline should be reduced to a 5-day suspension pursuant to the controlling Disciplinary Code, the Union argued.

## **Discussion**

### **Just Cause**

An analysis of a case claiming discipline for just cause as is presented here requires consideration of all of the circumstances presented to determine whether the Employer has met its burden of showing that the discipline at issue was fair. There is no single formula for making such a determination and each case must be considered based upon its own unique set of facts and circumstances.

Of the several factors typically considered by arbitrators when applying the just cause standard, I find that the determinative issues presented here are; (1) did Grievant engage in the insubordinate conduct alleged and (2) if he did engage in such conduct, whether the level of discipline issued against Grievant was appropriate considering the relative gravity of Grievant's offense under the circumstances. Based upon the record as a whole, I find that the City has met its burden of showing that Grievant engaged in the insubordination alleged, but that the City has failed to meet its burden of establishing that the level of discipline issued Grievant was appropriate under the circumstances.

### **Grievant Engaged in Insubordination**

The rights established by Weingarten do not give an employee *carte blanche* to refuse any and all conversations with management without a witness. Nor does it grant an employee a right to ignore orders that an employee may fear could lead to discipline. Theoretically, if such were the case any employee could refuse any meeting or any order because the employee's conduct during a meeting or potential poor execution of the order could be grounds for discipline. Such is not the purpose of Weingarten. Instead, the rights thereunder arise where management is engaging in a discipline-related investigatory interview of an employee and where - in such circumstances - the employee forms a reasonable belief that the interview could lead to the employee's discipline.

In the instant matter, Grievant admitted that when ordered to go into the Captain's office on September 21, Grievant refused.

By his own admission, Grievant did not have a reasonable expectation that the September 21 meeting was an investigatory interview or was of a disciplinary nature until after the moment that W [REDACTED] instructed M [REDACTED] to leave and directed Grievant to go into the Captain's office. Contrary to the claim of Grievant, I find nothing in such conduct by W [REDACTED] that would have created a reasonable belief that a discipline related interview was going to be conducted and that discipline of Grievant could result. There is no evidence that Captain W [REDACTED] was engaged in a discipline-related investigation at the time or wanted to interview Grievant as part of such investigation. Although Grievant may have developed a fear of the Captain, there is no generally recognized principle that under such circumstances an employee may

insist on having “protection” during meetings with management. Nor does the fact that an employee has exercised his or her right to file grievances, charges or discrimination claims somehow work to pardon the employee from the duties and obligations of being an employee – here those obligations of an officer of the law. Regardless of Grievant’s filing activities against Captain W [REDACTED], Grievant was still required to perform his duty and comply with the rules and policies of the department, including the expectation - fundamental to the operation of a police force – that legitimate orders of superiors be obeyed by subordinates. Grievant was not excused from this fundamental expectation of his position.

Grievant refused to obey an order; an order that I find was lawful as it pertained to legitimate police work within the area of responsibility of Captain W [REDACTED] and of which the Captain believed Grievant had information. Contrary to the argument of the Union, considerations of Weingarten do not provide Grievant protection from the consequences of his conduct on September 21. I find that Grievant engaged in the violation of policy – the insubordination - charged against him.

### **Remedy**

Just Cause requires that the Employer show that it has consistently applied the rule at issue and that the level of discipline assessed against Grievant is consistent with discipline assessed against other, similarly situated employees. I find that here the City has failed to meet its burden of showing that it has assessed a 15-day suspension to other employees who have engaged in conduct similar to that of Grievant.

Instead of offering sufficient evidence of other applications of the rule and similar 15-day suspensions, the City has relied on an argument that notwithstanding that the 15-day penalty originally assessed against Grievant was the minimum available under the now debunked 2010 Discipline Policy, the 15-day suspension is appropriate under the 1999 Discipline Policy because of the egregious nature of Grievant's conduct.

I am not persuaded by the City's argument in this regard. Grievant's conduct does not magically change its character when different policies are applied; his conduct is the very same conduct no matter which policy is applied. Thus, having issued the minimum penalty when it first assessed a penalty against Grievant in 2011, I am persuaded that at that time the City then exercised its managerial judgment and determined that under the circumstances the minimal penalty was appropriate. The City's current argument that Grievant's conduct should now be considered so egregious as to warrant more than the minimum penalty is inconsistent with its prior determination.

As the City has not established that other similarly situated employees have received a 15-day suspension regardless of the Discipline Policy applied by the City, I find – consistent with the City's prior determination - that the minimum penalty provided by the rule for a first offense is appropriate. Considering the penalty range set forth in the controlling 1999 Policy is from the minimum of a 5 to a maximum of a 30-day suspension, I find, that the 15-day suspension imposed by the City was inconsistent with just cause as it was unreasonably harsh considering the gravity of Grievant's conduct. As a consequence, I will order the penalty be reduced to a 5-day

suspension and that Grievant be made whole for his losses resulting from the City's issuance of a disciplinary suspension against him exceeding 5-Days.

### **Conclusions**

The Employer has met its burden of showing just cause for the discipline of Grievant for his refusal to promptly obey proper orders from a superior officer, but has failed to meet its burden of showing that it had just cause to issue Grievant discipline of a 15-day suspension.

### **AWARD**

The grievance is denied in part and granted in part.

The City has met its burden of showing just cause for the discipline of Grievant for his refusal to promptly obey proper orders from a superior officer.

The City has failed to meet its burden of showing that it had just cause to issue Grievant discipline for his conduct of a 15-day suspension.

The City is hereby Ordered to reduce Grievant's 15-day suspension to a 5-day suspension and to make Grievant whole for his lost wages and benefits resulting from the City's issuance of a disciplinary suspension against him exceeding 5-Days.

I shall retain jurisdiction over this matter for purposes of remedy only.



Dated: July 8, 2016

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Timothy J. Brown, Esquire  
Arbitrator